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In The

Supreme Court of the United States

October Term, 1998

RICHARD P. KRELL, et al.,

Petitioners,

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

I. THE LOWER COURTS CREATED A NEW LEGAL STANDARD FOR DETERMINING SUPPLEMENTAL JURISDICTION IN CONFLICT WITH 28 U.S.C. § 1367 2

II. THE LOWER COURTS ALSO CREATED NEW, LESS RESTRICTIVE ARTICLE III STANDING REQUIREMENTS 5

III. THE LOWER COURTS ALSO CREATED A NEW, LESS RESTRICTIVE "TYPICALITY" REQUIREMENT 6

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997) 2, 7

General Telephone Co. v. Falcon, 457 U.S. 147 (1982) 7

HB General Corp. v. Manchester Partners, L.P., 95 F.3d 1185 (3d Cir. 1996) 4

Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375 (1994) 5

Leonhardt v. Western Sugar Co., 160 F.3d 631 (10th Cir. 1998) 2

Lewis v. Casey, 518 U.S. 343 (1996) 4, 6, 7

Peacock v. Thomas, 516 U.S. 349 (1996) 5

United Mine Workers of Am. v. Gibbs, 383 U.S. 715 (1966) 3, 5

STATUTES AND RULES

28 U.S.C. § 1331 2

28 U.S.C. § 1332 2

28 U.S.C. § 1367 ..... 1, 2, 5

Fed.R.Civ.P.Rule 23 ..... 1, 2, 6, 7, 8, 9

OTHER AUTHORITIES

American Law Institute, Federal Judicial Code Revision Project, Tentative Draft No. 2 (April 4, 1998) 4

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

This petition graphically demonstrates the need for further guidance from this Court to prevent the vices resulting from overly broad nationwide settlements, based primarily on state law claims, similar to those found in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

The Petition is not based on a dispute over factual findings, as Respondents contend, but rather from the lower courts' new excessively broad legal standards for determining (1) the scope of 28 U.S.C. § 1367 supplemental jurisdiction, (2) Article III standing, and (3) the typicality requirement of Fed.R.Civ.P.Rule 23. These new legal standards, which erode procedural protections for Class Members, led to this sprawling settlement class.

Respondents, in their Briefs, in essence, request this Court to ignore the constitutional requirements of standing and jurisdiction, as well as the Rule 23 requirement, grounded in due process, of typicality. A nationwide settlement, however, cannot be used to negate constitutional and Rule 23 safeguards.

This entire 8 million policyholder class was built upon the federal security claim of only one named plaintiff, Martin Dorfner (App. 33), who entered into a single securities transaction in April 1991 (App. 16 n.11) and asserted only a vanishing premium claim and a churning claim. He did not even assert an investment plan claim or one of the undefined "other claims," which may be applicable to millions of policyholders. App. 486-489 and App. 16 n.11. Yet, this entire class settlement of diverse and

individualized state law claims arising in all fifty states and the District of Columbia hinges upon 28 U.S.C. § 1331 federal question jurisdiction over Dorfner's one individual security claim.[1]

Both Article III and the typicality requirement of Rule 23 require that the rights of all class absentees be protected. The limiting principles of supplemental jurisdiction further protect class absentees from release of their very separate and distinct state law claims. These principles are further addressed in the Petition and below.

I. THE LOWER COURTS CREATED A NEW LEGAL STANDARD FOR DETERMINING SUPPLEMENTAL JURISDICTION IN CONFLICT WITH 28 U.S.C. § 1367

Krell's Petition focuses on whether the lower courts properly concluded that a "common nucleus of operative fact" binds the federal claims and the undefined, unpled "other claims," when the record contains *no* facts about the "other claims" to justify that decision.[2] Krell agrees

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[1] Class Counsel, in their Brief, argue that supplemental jurisdiction based on diversity of citizenship under 28 U.S.C. § 1332 also provides a proper basis for federal question jurisdiction. The recent decision of the Tenth Circuit in *Leonhardt v. Western Sugar Co.*, 160 F.3d 631 (10th Cir. 1998), is directly to the contrary and forms yet another reason for this Court to grant review to resolve a split within the Courts of Appeals.

[2] Virtually the only information about "other claims" comes from the Class Notice (*not* the September 19, 1996 Complaint), which defines the "Other Claims" as any "other improper life insurance sales practices." App. 487. The so-called "other claims" were first introduced in the settlement

that supplemental jurisdiction is a practical concept designed to improve judicial efficiency. However, because of the generalized definition of "other claims," the lower courts could not have known the legal elements or factual premises of such "other claims" and could not have made a reasoned decision whether supplemental jurisdiction existed.

At Respondents' urging, the strict "common nucleus of operative fact" requirement was replaced by a substantially broader "common scheme" requirement. The lower courts concluded that allegations of a common scheme to defraud policyholders created a "common nucleus of operative fact" without first determining that the undefined "other claims" and Dorfner's federal securities claim require common proof. To avoid detailed analysis of the "other claims," the courts simply presumed that the millions of state and federal claims were united by a "common scheme" and that, therefore, they inherently shared a "common nucleus of operative fact." App. 42. The Panel held that "all of the claims derive from the same common scheme, and thus from the same 'nucleus of operative fact,' " thereby improperly equating a "common scheme" with a "common nucleus of operative fact." App. 42. It constitutes legal error to substitute a "common scheme" for the "common nucleus of operative fact" required by *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715 (1966).

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agreement that released them. See the district court approved Class Notice at "Description Of The Law Suits." App. 475-477. *See also* Petition at 3-7.

By substituting non-Article III "schemes" for Article III "claims," there is no longer any meaningful limit to supplemental jurisdiction. A complaint need only make allegations at a sufficiently high level of generality to enable the court to find some aspect of commonality. Indeed, in *Lewis v. Casey*, 518 U.S. 343 (1996), supplemental jurisdiction would have been maintainable based on a pled "common scheme to deprive all prisoners of their constitutionally protected rights." This result, based on a "scheme" instead of a "claim," is inconsistent with Article III. The fact that federal and state claims "all derived from the same common scheme" is insufficient where, as here, proof of the scheme would not establish any of the potential millions of "other claims."

The lower courts, without knowing the elements of the undefined millions of "other claims," could not undertake the required *Gibbs* analysis. Thus, the assertion of jurisdiction over Class Members with only "other claims" was improper since there was no finding that the federal claim and the millions of "other claims" "share significant factual elements." *See HB General Corp. v. Manchester Partners, L.P.*, 95 F.3d 1185, 1198 (3d Cir. 1996). The prerequisite that Dorfner's federal securities claim rely on basically the "same" facts as the millions of potential unknown "other claims" cannot possibly be determined on the existing record. *See* American Law Institute, Federal Judicial Code Revision Project, Tentative Draft No. 2, pp. 32-35 (April 4, 1998), defining the narrow scope of an Article III "claim," which definition has no similarity to that of a so-called "common scheme."

As to the other *Gibbs* jurisdictional prerequisites, it is meritless to suggest that Dorfner, in pursuit of his securities law claim, would be expected to litigate on behalf of millions of other policyholders who had only state law claims, most of which were the undefined "other claims." It is simply unfathomable that one named plaintiff, with a 1991 federal securities claim, and not even a pled "investment claim," would be expected to litigate claims for millions of policyholders with only investment claims or only unpled, undefined "other claims."

It is the settling parties' heavy burden to demonstrate an adequate basis for subject matter jurisdiction. "It is to be presumed that a cause *lies outside* this limited jurisdiction . . . " (emphasis added). *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). The settling parties here have not met that burden. The lower courts' judicial expansion of supplemental jurisdiction is inconsistent with Article III and warrants this Court's intervention.[3]

II. THE LOWER COURTS ALSO CREATED NEW, LESS RESTRICTIVE ARTICLE III STANDING REQUIREMENTS

Broad allegations of a scheme to defraud, instead of specific claims giving rise to injury, do not satisfy Article III. Perhaps more than on any other issue, the rulings

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[3] Respondents' attempts to distinguish *Kokkonen* and *Peacock v. Thomas*, 516 U.S. 349 (1996) on the ground that they address ancillary jurisdiction, rather than pendant jurisdiction, are meritless. 28 U.S.C. § 1367 codified both ancillary and pendant jurisdiction and condensed both concepts under the term "supplemental jurisdiction."

below run afoul of this Court's standing decision in *Lewis v. Casey*, 518 U.S. 343 (1996). The question in *Lewis* was whether prisoners with one type of claim, failure to provide special services for an illiterate prisoner, could represent other prisoners with different complaints, such as the lack of special services or facilities required by non-English speakers, by prisoners in lockdown, and by the inmate population at large. This Court rejected that attempt, because the different groups of prisoners asserted different kinds of claims and injuries. *Id.*, at 358 n.6. Yet, if the judicial path endorsed below had been followed, *Lewis* could be very easily circumvented by class allegations that "defendants violated class constitutional rights to access to the courts." Stated another way, the more general the allegations, the less of a barrier the law of standing creates. This potential for eviscerating *Lewis* by utilizing "schemes" instead of Article III claims provides another significant reason for granting review.

III. THE LOWER COURTS ALSO CREATED A NEW, LESS RESTRICTIVE "TYPICALITY" REQUIREMENT

A broadly alleged "scheme to defraud" likewise does not substitute for the "typicality" standard under Rule 23(a). Although there are virtually no facts in the record about the "other claims" and not a single named policyholder who even asserted such a claim, the courts below allowed a single named plaintiff (Martin Dorfner) with a federal securities law claim to represent millions of policyholders with only "other claims." The lower courts reached this conclusion by making the same error that affected their rulings on subject matter jurisdiction and

standing: they allowed general allegations of a "scheme to defraud," and a demand for "economic damages" for all policyholders, to substitute for the stringent typicality requirement of Rule 23(a)(3).

Such an outcome runs directly contrary to the spirit, if not the holding, of *Lewis*. It is totally inconsistent with *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982), where employees who claimed racial discrimination in job promotion were denied the right to represent potential employees whose claims were based on discrimination in job applications. Nor can such a result be squared with this Court's recent decision in *Amchem*, which set aside a settlement because the class was too diverse and too rife with conflicts to meet the requirements of Rule 23(a). The effort to homogenize the class in *Amchem* was done by alleging that everyone was similarly interested in maximizing their recovery from defendants from their asbestos injuries. This Court declined to allow such broad-brush treatment, yet that is precisely what was endorsed below as to "other claims."

Indeed, this settlement is even more egregious than in *Amchem* because in that case at least there were named plaintiffs who purported to represent each of the different components of the class. Moreover, the legal basis for each subclass's claims in *Amchem* was known. Here, by contrast, there is no identified named policyholder who asserted an "other claim," and there are no facts in the record that demonstrate the factual bases for, or elements of, those claims.

At most, the record demonstrates that Dorfner and the other named policyholders only "intended" to assert

one or more of the possible thousands of unknown "other claims" of millions of Class Members (App. 54), *but did not do so*. A mere "intention" to state a claim does not satisfy the demands of either Article III or the Federal Rules of Civil Procedure. The fulfillment of these requirements is essential to safeguard the class, especially in a class action respecting the life insurance policies of eight million persons.[4]

As demonstrated by Class Counsel's September 19, 1996 Complaint, filed after extensive motion practice and substantial discovery, no attempt was made to plead claims other than the three identified sales practice claims. *See, e.g.*, September 19, 1996 Complaint ¶ 177 which stated that "Plaintiffs' claims are typical of those of the Class Members: each was victimized by one or more of the "churning," "vanishing premium" or "investment plan" aspect of Prudential's fraudulent scheme." Thus, the lower courts confronted a record that could not have enabled them to make the required determinations under Rule 23(a)(3), and hence their conclusions that the claims of the named policyholders were typical of those policyholders with "other claims" are unsustainable as a matter of law.

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[4] The abrogation of the procedural safeguards of Rule 23(a)(3) may be highlighted by the settlement results. While the settlement may be excellent for the owners of less than 15% of the policies, the owners of at least 9.1 million (85%) of the 10.7 million class policies will not receive any remedy in exchange for their releases. App. 540a. This is despite the fact that "Prudential's misconduct injured all Class Members." *See* Class Counsel's Brief at 12.

As with the other issues presented by the Petition and in this Reply, the errors below under Rule 23(a)(3) are of significance far beyond this lawsuit, and hence warrant review by this Court.

CONCLUSION

For these reasons and those set forth in the Petition, the writ should be granted.

Respectfully submitted,

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